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CASE NO. 84-467

UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

CARTER-GLOGAU LABORATORIES, INC.,	)	PETITIONER'S REPLY TO BRIEF OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Petitioner,	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

SNELL & WILMER
3100 Valley Bank Center
(602) 257-7362
Phoenix, AZ 85013

Gerard Morales
Counsel of Record
Thomas J. Kennedy
Attorneys for Petitioner

21pp

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SNELL & WILMER
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Counsel of Record
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JURISDICTION

This Reply Brief to Respondent's National Labor Relations Board Response is submitted by Carter-Glogau Laboratories, Inc., pursuant to Rules of the Supreme Court of the United States, Rule 22.5.

ARGUMENT

In the Brief for the National Labor Relations Board in Opposition, the National Labor Relations Board (hereinafter "Board" or "NLRB") puts forth two arguments. First, the Board contends, absent any authority, that Carter-Glogau Laboratories, Inc. (hereinafter "Carter-Glogau") is foreclosed from raising the issue of the Union's pre-petition misconduct because there was no separate election objection to the Union's pre-petition

strike misconduct filed. (Brief for the National Labor Relations Board in Opposition, P. 4) Second, the NLRB claims that the law respecting the relevancy of election objections is not in a chaotic state and that the cases cited by Carter-Glogau (pet. 15-18, 23-26) fall within inapplicable exceptions. Neither contention can withstand scrutiny.

It is axiomatic that the Regional Director is permitted to set aside an election on the basis of conduct discovered even though that particular conduct is not the subject of a specific objection. *Seneca Foods Corporation*, 244 NLRB 558, fn 3 (1979); *Rosehill Cemetery Association*, 262 NLRB 1289, fn 2 (1982). The policy for this rule is enunciated in

American Safety Equipment Corporation, 234 NLRB 501, (1978) wherein the Board declared that "the Regional Director is not required to, nor can he properly, ignore evidence relevant to the conduct of the election . . . simply because the Union may not have specifically mentioned such conduct in its objections". And, the Board also indicated "no matter which approach the Regional Director chooses, if he receives or discovers evidence during his investigation that shows that the election has been tainted, he has no discretion to ignore such evidence and it is reversible error if he fails to set aside the election". *American Safety Equipment Corporation, supra.* at 501. The thinking underlying the Board's approach is that

this policy is consistent with the trend of modern pleading practice which tends to eliminate, if not remove, technical niceties. *See too, The Developing Labor Law*, Volume 1, 2d Edition, Ed. Morris at P. 407; *NLRB v. Leslie Metal Arts Co.*, 530 F.2d 720, (6th Cir. 1976); *International Shoe Company*, 123 NLRB 682, (1959) (". . . jurisdiction of the Regional Director in making post-election investigations is not limited to the specific issues raised by the parties") *Carter-Lee Lumber Company*, 119 NLRB 1374, (1978), *see too, Neptune Water Meters Co.*, 221 NLRB 428, 438, (1975) (where the Administrative Law Judge and Board reviewed the following election objection substantially similar to the "catch all"

Carter-Glogau objection, "By the facts set forth above and by other acts and conduct the employer interfered with the rights to select a collective bargaining representative." The Administrative Law Judge, with Board approval, declared "this type of omnibus objection designed to rely on evidence during the course of a post-election investigation has been approved by the Board.[1/]

To be sure, there is no question that the election objections filed by the employer encompassed the conduct

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1/ The phrasing of the Carter-Glogau objection subsuming the pre-petition election misconduct by the Union is as follows: "By these and other acts and conduct, the Union, through its agents, engaged in improper and illegal conduct that affected the results of the election". Appendix "C" at 54a.

described in the then-pending unfair labor practice proceeding against the Union. Over six months before the filing of the election objections, the Regional Director of the NLRB issued a complaint against the union for its pattern of serious, repeated unfair labor practice activity *see Construction Production & and Maintenance Laborers Local Union 383*, 260 NCRB 1340 (1982) (Board found that the union had committed 26 unfair labor practices.) All parties, the Regional Office of the NLRB which issued the Complaint against the Union, the employer and employees who had been victimized by the Union's unfair labor practices, and the Union, the perpetrator of the misconduct, were well aware of these unfair

labor practices before, during, and after the election. Indeed, the employer expressly made the Union's unfair labor practice activity part of the record in the challenged ballot/objections hearing. (Appendix "C", at p. 37a)

Furthermore, it is plainly erroneous for the NLRB to assert that the case law cited by petitioner represents exceptions to its "rule" barring consideration of pre-petition misconduct in an election objections proceeding. If so, the exceptions have engulfed the "rule".

At least three appellate courts have expressly considered pre-petition misconduct in determining whether an NLRB election should be overturned. *NLRB v. R. Dakin and Company*, 477 F.2d 492, (9th

Cir. 1973); *NLRB v. Anchorage Times Publishing Company*, 637 F.2d 1359, (9th Cir. 1981), cert. den. 454 U.S. 835 (1981); *NLRB v. Lawrence Typographical Union*, 376 F.2d 643 (10th Cir. 1967); *Catholic Medical Center of Brooklyn and Queens, Inc. v. NLRB*, 589 F.2d 1166 (2d Cir. 1978). Shortly after the filing of this petition, the Third Circuit aligned itself with the Second, Ninth, and Tenth Circuits and found that pre-petition misconduct should be considered in the analysis of election objections, at least where the election turned on only a handful of votes and where the pre-petition misconduct consisted of violent acts. *NLRB v. L & J Equipment Co.*, No. 83-3275, (3rd Cir. Sep. 28, 1984), slip op. 28. On the

other hand, the Fifth Circuit has sanctioned the NLRB prepetition exclusionary rule thereby creating an inter-circuit conflict. *See NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, (5th Cir. 1969).

The Court in *L & J Equipment Co., supra*, noted the uneven application of the NLRB "rule" barring the consideration of pre-petition misconduct. For example, the court found a history of NLRB infidelity to the "rule" in reviewing *Baker Machine and Gear, Inc.*, 220 NLRB 194, (1975) (discharge of leading Union adherents prior to filing date is sufficient basis for setting an election aside); *Willis Shaw Frozen Express, Inc.* 209 NLRB 267, (stabbing and assaults prior to filing date must be considered) and *Weather Seal Incorporated,*

161 NLRB 1226 (1966) (interrogation of, threats against, and dismissal of Union activists prior to filing date grounds for new election). Additionally, the Third Circuit noted that the NLRB disregards its own "rule" when it finds a coercive atmosphere created by pre-petition misconduct which persists up to the time of the election. *Servomation of Columbus*, 219 NLRB 504, (1975) or even when such pre-petition misconduct "lends meaning and dimension" to later conduct. *Dresser Industries, Inc.*, 231 NLRB 591 n. 1 (1977).

The Third Circuit also noted the "flexible attitude" taken toward the NLRB "rule" by other circuits and expressly adopted the approach of the Ninth Circuit

in *NLRB v. R. Dakin and Company, supra,* which found the NLRB "rule" as simply an evidentiary device. In short, the Third Circuit views the NLRB "rule" as little more than a guideline, and a guideline to be ignored where the facts warrant. Applying this guideline, the Third Circuit ruled: "we thus conclude that the Board placed undue weight on the fact that the fire occurred several weeks before the filing of the election petition. Common sense requires us to recognize that memories of such a violent act would not have disappeared before the election. Particularly where the election turned on only a handful of votes, we cannot say that such an event had no effect upon the election." *L & J Equipment Co., supra.*

So too here where the election outcome turned on a shift of but five votes[2/] and there was a pervasive pattern of Union violence in the pre-petition period memorialized in *Construction, Production and Maintenance Laborers Local Union 383*, 260 NLRB 1340, (1982).

In short, the union committed no fewer than 26 unfair labor practices including one threat to blow up the employer's facility and numerous incidents of damage to property and threats on non-striking employees. It is apparent that parties to NLRB conducted election are

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2/ The revised election tally indicated that of 148 ballots cast, 77 were cast for the Union, 67 were cast against the Union and 4 votes were left uncounted as nondeterminative challenged ballots (App. 12a).

now in the unenviable position of not knowing what posture the NLRB or the reviewing appellate courts will assume in a particular case. The current state of the law is completely antithetical to predictability and certainty in the law. The appellate courts are divided on the subject with at least four appellate courts refusing to treat the NLRB "rule" of ignoring pre-petition misconduct as any thing but an advisory guideline. In the words of the Third Circuit, this NLRB "rule" is not to be "used to exclude important evidence needed to evaluate misconduct". Yet the Board here invoked this pre-petition exclusionary rule prejudicially truncating the post-election inquiry into the integrity of the elec-

tion, failing to consider relevant evidence, and defying the decisional law of four appellant courts.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court grant its Petition for Writ of Certiorari. Decisional chaos now reigns in this critical area of federal labor law. For example, over 5000 NLRB elections were held in fiscal 1982. *Labor Relations Yearbook*, 1982 (B. N. A. 1983) Pre-petition electoral misconduct must be considered in cases, such as this, where there is rampant, disruptive pre-election violence and a close election outcome. Indeed, all relevant evidence should be considered by the NLRB

and not be systematically excluded through the use of an ill-conceived analytic device which in reality hinders rather than abets reasoned, principled, decision-making. Certainly "laboratory conditions" *General Shoe Corp.*, 77 NLRB 124 (1984) - the NLRB's self-created standard for the holding of an election - were absent in the Carter-Glogau election.

Respectfully submitted this 5 day of December, 1984.

Snell & Wilmer

By _____
Gerald Morales
Counsel of Record
Thomas J. Kennedy
3100 Valley Bank Center
(602) 275-7388
Phoenix, Arizona 85073
Attorneys for Petitioner

12TJK0010